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IN THE

# Supreme Court of the United States

October Term, 1970.

No. 718

DELAWARE VALLEY ARMAMENTS, INC.
*Petitioner,*

and

EDITH BISHOP, EMILLA COMOROTE, ELVA LOVE, DOROTHY PARKS, HELEN REYNOLDS, DONNA RIEBLE, JUANITA RUDOLPH, JENNY TREMPER, ANNA WEBBER and CAROLYN WERTS, Intervenors
Individually and Representatives of Class

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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# Supreme Court of the United States

OCTOBER TERM, 1970.

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*Petitioners,*

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*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Delaware Valley Armaments, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this proceeding on August 11, 1970.

## OPINIONS BELOW.

The judgment and opinion of the court of appeals, not yet reported, appear in the Appendix hereto.

The opinion of the district court is not published, being a memorandum opinion, and appears, with the judgment of the district court, in the Appendix hereto.

## JURISDICTION.

The judgment and opinion of the United States Court of Appeals for the Third Circuit was entered on August 11, 1970, affirming the United States Disfrict Court for the District of New Jersey's "Order requiring Obedience to Subpoena Duces Tecum", entered October 30, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

## QUESTIONS PRESENTED.

I. Did the National Labor Relations Board abuse its discretion by requiring an employer to furnish a list of its employees' addresses for a union's use without holding an adequate adjudicatory hearing on the necessity of such a list in the instant case?

II. Did the instant application of the practice of the National Labor Relations Board, in demanding an *Excelsior* list from an employer without an adequate hearing deprive the employer of procedural due process of law?

III. Did the National Labor Relations Board abuse its discretion by not holding an adjudicatory hearing on newly discovered, material, substantive-factual issues before ordering an *Excelsior* list?

## STATUTES INVOLVED IN THE CASE.

United States Constitution, Amendment V.

Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*, sections 551(4); 553.

National Labor Relations Act, 29 U. S. C. 151 *et seq.*, section 156.

### U. S. CONSTITUTION:

**Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### ADMINISTRATIVE PROCEDURE ACT

5 U. S. C. §§ 551, 553.

**§ 551. Definitions.**

For the purpose of this subchapter—

* * * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the

organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

* * *

**§ 553. Rule Making.**

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.

## NATIONAL LABOR RELATIONS ACT

29 U. S. C. A. § 156.

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter. July 5, 1935, c. 372, § 6(a), 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

## STATEMENT OF THE CASE.

This case came to the district court when the National Labor Relations Board sought enforcement of its subpoena *duces tecum* under the provisions of the National Labor Relations Act, 29 U. S. C. § 151 et seq., section 161.

On January 16, 1969, the National Labor Relations Board (Board) ordered Delaware Valley Armaments, Inc. (DVA) to furnish a list of its employees' home addresses to be used by the International Union of Electrical Workers (Union). This order was made by the Board without holding a hearing at which witnesses for the employees, DVA, the Union, or the Board could be heard, examined or cross-examined in a situation where (A) the employees had each, individually, indicated that they did not wish their addresses furnished to Union organizers (B); there was evidence of harassment of the employees by Union organizers; (C) some Union organizers had known criminal records; (D) the great majority of the employees were female. Despite the fact that DVA promptly requested such a hearing in subsequent Exceptions to the *Order, the Board refused to hold* a hearing, at all times treating its request for addresses as if the so-called "*Excelsior*" address requirement was a "rule" of national substantive validity.

A Board subpoena for the list was ordered enforced by the district court, which stayed its action pending appeal to the court of appeals. In that appeal the court affirmed the district court and this Petition follows timely.

This case had its genesis when the Union sought to organize a unit of over 300 DVA employees, most of whom were female. During the summer and fall of 1968 the Union conducted a representative campaign at DVA's New Jersey plants in Cherry Hill and Mt. Laurel. Both Union

and employer had full access to the employees at entrances and exits to the plant. Both distributed literature.

A petition for a representative election was filed with the Board late in the summer of 1968. A representation hearing was held and as a result an election was ordered in September, 1968. At the hearing DVA resisted the Board's request to furnish a list of employee's addresses on the basis of the First Circuit decision in *Wyman-Gordon Co. v. National Labor Relations Board*, 397 F. 2d 394 (1st Cir. 1968).[1]

The election ordered for September 1968 was postponed until December 1968. In the election the Union representation effort was rejected by the DVA employees by a 2-1 vote.

During the election campaign and especially after the subsequently postponed September election had been scheduled, DVA became aware that its female employees were being harassed and that the Union organizers had questionable records. It was during this period that a great many employees expressed in writing their grave displeasure at the Union obtaining their addresses. DVA did supply the addresses of the 83 employees who did not request that their names be withheld. On this basis the above described election was held on December 12, 1968.

On January 16, 1969, the Board issued a Supplemental Decision (A-4) setting aside the December election relying on the "Rule" in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), and ordered a new election (A-4) directing DVA to furnish the requested list.

DVA filed Exceptions to this Order, noting its knowledge, acquired principally after the August 29, 1968 Election Order, that the female workers feared harassment and were, in fact, being harassed by the Union oragnizers, some

1. The United States Supreme Court in *NLRB v. Wyman-Gordon Co., infra*, had not at this time been handed down.

of whom were known to have questionable records. In these Exceptions DVA indicated its desire for an adjudicatory hearing.

But no adjudicatory hearing was held at this time or at any other time, despite the employer's request. No testimony was ever heard concerning this coercion of DVA employees. Nor was evidence ever presented that an *Excelsior* list with home addresses was necessary for complete factual disclosure.

The list was not furnished. DVA contends that in-home communication by the Union organizers would have so further frightened the employees that the required laboratory conditions would become impossible to obtain.

Subsequently the Board and counsel for DVA communicated with reference to *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U. S. 759, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969). Counsel for DVA indicated that the employer construed that decision to require an adjudicatory hearing, such as had been requested by employer. DVA also indicated that the appropriate procedure would be to hold a hearing, at which DVA was prepared to offer its evidence of coercion.

The Board denied the request for a hearing and in lieu thereof, issued its subpoena (A-10) which is the subject of this case.

DVA filed a Petition to Revoke the subpoena, again referring to the peculiar facts of the present case. Again DVA indicated its desire to take part in an adjudicatory hearing as contemplated by the *Wyman-Gordon* case rationale.

This Petition to Revoke was likewise denied by the Board (A-12).

Following this denial the Board moved for a district court order. The district court granted the Board's request, but stayed its action pending DVA's appeal.

On December 5, 1969, the United States Court of Appeals for the Third Circuit denied the Board's emergency Motion to Vacate the Stay of Appeal (A-25), and on August 11, 1970, after oral argument, the court of appeals affirmed the judgment of the district court (A-27). A motion to Stay the Mandate of the Court was granted for 15 days on September 3, 1970, and this Petition follows.

## REASONS FOR GRANTING THE WRIT.

### I. The Court of Appeals Erred in Its Application and Interpretation of *National Labor Relations Board v. Wyman-Gordon Co.*, 394 U. S. 759, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969) by Holding That Delaware Valley Armaments, Inc. Must Submit an "*Excelsior*" List of Its Employees' Addresses Without a Proper Hearing on the Propriety of Such a Submission in This Particular Case.

The decision handed down in *National Labor Relations Board v. Wyman-Gordon Company*, 394 U. S. 759, 89 S. Ct. 1426, 22 L. Ed. 2d 709 (1969), is one of national impact, application, and concern. The opinion, by Mr. Justice FORTAS, stated that the order of the Board, which directed the Wyman-Gordon Company to supply an *Excelsior* list was itself a valid adjudication (*i.e.*, made pursuant to an adjudicatory hearing and directed specifically at the Wyman-Gordon Company), and, as such, was to be obeyed. *NLRB v. Wyman-Gordon*, *supra*, at 766. At the same time, however, Mr. Justice FORTAS criticized the Board for avoiding the rule-making provisions of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* "the rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application . . . they may not be avoided by the process of making rules in the course of adjudicatory proceedings." *NLRB v. Wyman-Gordon Co.*, *supra*, at 764. Mr. Justice FORTAS also noted that even the Board itself felt that it was establishing a rule, albeit neither in conformance with Section 6 of the National Labor Relations Act (NLRA), 29 U. S. C. § 156 nor the Administrative Procedure Act 5 U. S. C. § 551(4); § 553. That the Board does consider the *Excelsior* rule to be a command is not a misstatement. In

the instant case the Regional Director, in his Supplemental Decision on Objections to the Election and Direction of Second Election (Apps. Ref.) stated that "Although the Board does not mechanically apply *Excelsior*, the Employer's failure to submit the complete list . . . constitutes failure to comply with *Excelsior*." (Appx. Ref.). However, the Board has admitted that the cases that do not require a mechanical application involve situations "where the list was actually furnished by the employer." *Fuchs Baking Co.*, 174 NLRB 108 (1969), 70 LRRM 1294, 1969 CCH NLRB ¶ 20574, 20575. Thus those cases in which the Board did permit any deviation from the "Excelsior rule" were those in which the list furnished was imperfect in some slight manner.[2]

**II. The Decision of the Court of Appeals Further Frees the National Labor Relations Board From the Necessity of Conforming to Congressional and Judicial Control, and From the Mandate of the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* From This Much Confusion Ensues.**

The concurring opinion of Mr. Justice BLACK, however, interprets the prevailing opinion as freeing the Board ". . . from all judicial control whatsoever regarding compliance with procedures specifically required by applicable federal statutes such as the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, and the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.*" *NLRB v. Wyman-Gordon Co.*, *supra*, at 770.

It is suggested that the *Wyman-Gordon* decision may be having exactly the effect that Mr. Justice BLACK feared it would; the instant case is an example. While the Board,

2. For instance, in *Telonic Instruments*, 173 NLRB 187 (1968), 69 LRRM 1398, 1399, the Board held that the omission of 4 names from a list of 111 eligible voters did not warrant the invalidation of the election.

in its own mind, feels it does not apply the *Excelsior* rule mechanically, it has here refused to hold a hearing to adjudicate on the merits as to whether such a list is necessary in each individual case. Thus it continues to apply as a Rule a decision made not in conformance with the rule-making procedure. If the courts do not begin to force the Board to either adjudicate each case or create a proper rule, then indeed the Board is free from ". . . all judicial control whatsoever regarding compliance . . ." *NLRB v. Wyman-Gordon*, *supra*, at 770, with the National Labor Relations Act and the Administrative Procedure Act.

Since the decision in *NLRB v. Wyman-Gordon Co.*, *supra*, on April 23, 1969, there has been a spate of law journal articles, comments, and notes concerning both the administrative process and the *Wyman-Gordon case*.[3]

Of course, the National Labor Relations Board has long been accused of ignoring Congress' legislative mandate as to rule-making and adjudication. See: Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L. J. 729 (1961); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965); and, again, Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. Pa. L. Rev. 254 (1968).

Some recent commentators are optimistic. Glen O. Robinson sees the fact that a majority of the Court disapproved of the practice of the Board in promulgating rules through individual case adjudication as a sign that the courts will continue to badger the Board until the Board increases its rule-making. Robinson, *The Making of Ad-*

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3. E.g.: 43 Temp. L. Quar. 118 (1970); 118 U. Pa. L. Rev. 485 (1970); 11 Bost. Col. Ind. & Comm. L. Rev. 64 (1969); 20 Lab. L. J. 599 (1969); 54 Iowa L. Rev. 1080 (1969); 117 U. Pa. L. Rev. 616 (1969); 15 Wayne L. Rev. 763 (1969); 11 Wm. & Mary L. Rev. 424 (1969).

*ministrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedural Reform*, 118 U. Pa. L. Rev. 485 (1970). This optimism is rare.

The questions evinced by the Court's decision in *NLRB v. Wyman-Gordon Co., supra*, are more consistently a subject for scholarly bewilderment. "The failure of the Court to remand, however, even though the Board based its order on the discredited *Excelsior* rule, suggests the possibility that the Board can enforce rules improperly promulgated in adjudicatory proceedings, and thus, as a practical matter, avoid the newly defined restrictions." *Rule-Making and Adjudication in Administrative Policy Making: NLRB v. Wyman-Gordon Co.*, 11 Bost. Col. Ind. & Comm. L. Rev. 64 (1969). A former NLRB attorney commented: "If this writer received any dominating impression from the oral argument, it was that the Justices were not pleased with the Board's failure to use rule-making procedures." William J. McDonald, *The Wyman-Gordon Case: A Second Look at the NLRB's Excelsior* Rule, 20 Lab. L. J. 599 (1969). Yet, if the Court does not in some manner restate its holding in *NLRB v. Wyman-Gordon Co., supra*, this confusion and lack of clarity concerning the Board and its *Excelsior* "rule" will not abate.

**III. The Court of Appeals Erred in Holding That Petitioner Was Afforded Procedural Due Process of Law When an Indispensable Component of Due Process—a Hearing—Was Never Granted Petitioner on a Material, Substantive Issue: the Effect of Pre-election Coercion on the State of Mind of the Petitioner's Employees, and the Further Effect That Releasing Their Addresses Will Have in the Light of Such Coercion, Especially With the Knowledge That the Union Organizers Have Questionable Records.**

This matter also involves the question whether, under the holding of *NLRB v. Wyman-Gordon Co., supra*, and,

as a matter of procedural due process of law,[4] there is a right to a hearing to determine whether, on the facts of a *particular case*, an *Excelsior*[5] list must be produced. Chief

4. "No person shall be deprived of life, liberty, or property, without due proces of law . . . ." U. S. Const., amend. V. Such is the command of the United States Constitution. And although what constitutes due process may vary to meet differing circumstances, ". . . it has long been clear that where a government affects the private interests of an individual, it may not proceed arbitrarily, but must observe due process of law . . . ." *Madera v. Board of Education of the City of New York*, 386 F. 2d 778, 783 (2d Cir. 1967). Required as minimum elements of procedural due process, among other things, are adequate and timely notice of the charges against him, *Frisbie v. Collins*, 342 U. S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952), a hearing, *Powell v. State of Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), and opportunity to produce evidence in his own behalf, *Baltimore & O. R. Co. v. United States*, 398 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209 (1936). Especially important is the right to a hearing before one's rights are determined, *Asbury Truck Co. v. Railroad Commission of the State of California*, 52 F. 2d 263 (S. D. Cal. 1931), *affirmed*, 287 U. S. 570, 53 S. Ct. 94, 77 L. Ed. 501. ". . . the right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." *Railroad Commission of California v. Pacific Gas and Electric Co.*, 302 U. S. 388, 393 (1938). See also *Pierce v. Hildebrand*, 103 F. Supp. 396, 399 (S. D. Iowa 1952), citing *Grannis v. Ordean*, 234 U. S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914).

The right to procedural due process, including a hearing, is not ignored in proceedings with administrative agencies, *Parker v. Lester*, 227 F. 2d 708 (9th Cir. 1955). ". . . [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal riglits of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U. S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960), *rehearing denied*, 364 U. S. 855, 81 S. Ct. 33, 5 L. Ed. 2d 79 (1960). Even though the proceeding is not a trial *per se*, but is quasi-judicial in character, the constitutional requirements for procedural due process are no less exacting. ". . . opportunity for hearing [is] indispensible to due process . . . ." *Magnolia Petroleum Company v. Carter Oil Company*, 218 F. 2d 1, 6 (10th Cir. 1955). A fair trial ". . . is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. . . ." *National Labor Relations Board v. Phelps*, 136 F. 2d 562 (5th Cir. 1943).

5. *Excelsior Underwear, Inc.*, 156 N. L. R. B. 1236 (1966).

Justice Hughes, in *Morgan v. United States*, 304 U. S. 1, 14, 15, 58 S. Ct. 773; 82 L. Ed. 1129 (1937), was of the opinion that the right to a hearing went to the "very foundation of the action of administrative agencies . . . that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing' . . . such a hearing has been described as an 'inexorable safeguard'" (citations omitted), *Morgan v. U. S., supra*, at 15. See also *L. B. Wilson v. Federal Communications Commission*, 170 F. 2d 793, 802, 83 U. S. App. D. C. 176 (1948). "The Act [National Labor Relations Act] establishes standards to which the Board must conform." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893; 108 ALR 1352 (1937). These standards include notice, a chance ". . ." to produce evidence and witnesses to refute the charges, and that the decision of the Board shall be governed by and based upon the evidence produced at the hearing." *National Labor Relations Board v. Prettyman*, 117 F. 2d 786, 790 (6th Cir. 1941). And an *ex parte* "good faith" investigation of fact issues does not satisfy the procedural due process requirement of a hearing since there is no opportunity to cross-examine opposing witnesses or to introduce witnesses. *Trade Winds Company v. National Labor Relations Board*, 413 F. 2d 1213 (5th Cir. 1969); *Home Town Foods, Inc. v. National Labor Relations Board*, 379 F. 2d 241 (5th Cir. 1967); *National Labor Relations Board v. Joclin*, 314 F. 2d 627 (2d Cir. 1963); *National Labor Relations Board v. Dallas City Packing Company*, 230 F. 2d 708 (5th Cir. 1956).

In the instant case, appellant Delaware Valley Armaments, Inc., Petitioner herein, requested that an adjudicatory hearing be held before the Board, to determine

whether, in the light of newly acquired information,[6] concerning the activities of certain union men and supporters, an *Excelsior* list should be filed.

This was a proper request. The Exceptions filed by DVA to the Board's Supplemental Decision of January 16, 1969, raised substantial and material issues of fact which could be determined properly only by a formal hearing. The failure of the Board to provide a hearing was a denial of procedural due process. *Tyler Pipe and Foundry Company v. National Labor Relations Board*, 406 F. 2d 1272 (5th Cir. 1969). Orders which rest on crucial factual determinations made, as here, without hearing, cannot stand, especially when newly discovered evidence is offered. See: *Bausch & Lomb Incorporated v. National Labor Relations Board*, 404 F. 2d 1222 (2d Cir. 1968); *Macomb Pottery Company v. National Labor Relations Board*, 376 F. 2d 450 (7th Cir. 1967); *National Labor Relations Board v. Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (5th Cir. 1964); *National Labor Relations Board v. Lord Baltimore Press, Inc.*, 300 F. 2d 671 (4th Cir. 1962); *National Labor Relations Board v. Poinsett Lumber & Manufacturing Co.*, 221 F. 2d 121 (4th Cir. 1955). Where, as here, there are numerous substantial and material issues of fact which call for a formal hearing, the failure of the Board to provide one is a denial of due process. "A hearing is, therefore, necessary and indispensable if a proper and fair resolution of all the disputed facts contained in the charges . . . is to be made by the Board." *National Labor Relations Board v. Ortronix, Inc.*, 380 F. 2d 737, 740 (5th Cir. 1967).

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6. The essence of this information was that the petitioner's work force, virtually all female, because of Union activity and certain Union organizer's criminal records, did not wish their addresses disclosed to such men and would be in a state of fear if their addresses were given to the Union. See, e.g. printed Appendix from Third Circuit Record, 38a to 44a.

As a basic requirement of constitutionality, the necessity of a hearing cannot be gainsaid, notwithstanding assertions that the outcome would be the same whether or not the strict rigors of due process had been adhered to. "[I]t is no answer to say that in his particular case due process of law would have led to the same result. . . ." *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424, 35 S. Ct. 625, 59 L. Ed. 1027 (1915). See *Goldsmith v. George B. Prendergast Construction Company*, 252 U. S. 12, 40 S. Ct. 273, 64 L. Ed. 427 (1920). In *Russell-Newman Manufacturing Company v. National Labor Relations Board*, 370 F. 2d 980 (5th Cir. 1966), the refusal of a Trial Examiner to hold a hearing to consider relevant new matter was a denial of due process, notwithstanding that the Board would have reached the same conclusion without the new evidence. "Even if the order of the Board were justified by the facts . . . the necessity of according due process to the respondents is not obviated. No order is just if obtained without due process of law. . . ." *N. L. R. B. v. Prettyman, supra*, at 791, 792.

Nor can any administrative inconvenience incident to procedural due process be deemed sufficient grounds to deprive parties of constitutional rights. *Russell-Newman v. N. L. R. B., supra, First National Bank of Smithfield, North Carolina v. First National Bank of Eastern North Carolina*, 232 F. Supp. 725 (D. C. N. C. 1964), *reversed other grounds*, 352 F. 2d 267 (4th Cir. 1965).

The Fifth Amendment's due process guarantee of a hearing applies equally well to questions of fact as well as questions of law. *American Broadcasting Co. v. Federal Communications Commission*, 179 F. 2d 437 (U. S. App. D. C. 1949); *L. B. Wilson v. Federal Communications Commission, supra*.

Of course, the Board has wide administrative discretion over whether a particular set of facts warrants a

hearing. *National Labor Relations Board v. Allied Distributing Corp.*, 297 F. 2d 679 (10th Cir. 1961). But this discretion is not untrammelled; there are reasonable bounds in which this discretion can be exercised, and when these bounds are exceeded, the Board has abused its power, ". . . if the Board has clearly erred in denying a hearing, its order will not be enforced." *National Labor Relations Board v. Sun Drug Co.*, 359 F. 2d 408, 414 (3d Cir. 1966).

By denying hearings in cases where there is newly discovered or previously unavailable evidence which raises substantial and material issues of fact, the Board acts arbitrarily and abuses its power. *Macomb v. N. L. R. B.*, *supra*. "It is our opinion that the Board acted arbitrarily and unreasonably. In the representation proceeding it should not have ruled on the employer's objection to the election without a hearing, for there were substantial and material issues which could be determined properly only by a hearing." *United States Rubber Company v. National Labor Relations Board*, 373 F. 2d 602, 604 (5th Cir. 1967). *In Monroe Manufacturing Company v. National Labor Relation Board*, 403 F. 2d 197, 199 (5th Cir. 1968), the circuit court reiterated its stand:

"We hold that the action of the Board is arbitrary and unreasonable because under the circumstances of the case there were material disputed facts which required a hearing on the merits." See: *National Labor Relations Board v. Joclin Manufacturing Company*, 314 F. 2d 627 (2d Cir. 1963); *National Labor Relations Board v. J. R. Simplot Company*, 322 F. 2d 170 (9th Cir. 1963).

A most significant source for finding that the Board abused its discretion is where a party alleges coercion in a representation election campaign. Normally the facts as to the alleged acts of coercion are in dispute; the truth is not clear; and the Board, in order to properly decide the

issue, should, but does not, hold an evidentiary hearing. *National Labor Relations Board v. Smith Industries, Inc.*, 403 F. 2d 889 (5th Cir. 1968). In *Tyler Pipe and Foundry Company v. National Labor Relations Board*, 406 F. 2d 1272 (5th Cir. 1969), the Company requested either that the representation election be set aside due to campaign irregularities, or that the cause be remanded for an evidentiary hearing on the alleged irregularities. The court held that such proffered evidence, when added to the whole of circumstances surrounding the election, made it clear that there were material issues of fact which required a formal hearing and that the failure of the Board to hold such a hearing was a denial of procedural due process. The case was remanded for a full hearing. *Tyler v. N. L. R. B., supra.* See also *National Labor Relations Board v. Dallas City Packing Company*, 230 F. 2d 708 (5th Cir. 1956) (opportunity to prove coercion should have been granted).

The problem encountered where coercion is alleged was succinctly stated in *N. L. R. B. v. Smith, supra*, at 895:

"However, the problem in these representation proceedings is that we are dealing with the elusive concept of the subjective effect of objective union conduct on 'the minds of the voters,' and subjective as well as objective evidence may be sufficient to overturn the election."

When an issue requires determination of a witness' state of mind, it is important, and ordinarily essential, that the trier of fact be afforded the chance to observe the demeanor of that witness during both direct and cross-examination. *Consolidated Electric Co. v. United States*, 355 F. 2d 437, 438-439 (9th Cir. 1966). See the specially concurring opinion of Rives, Circuit Judge in *Riley-Stabler Construction Company v. Westinghouse Electric Corporation*, 401 F. 2d 527, 528 (5th Cir. 1968).

One of the important state of mind issues is the effect of the election and *pre-election* practices of union supporters on the mind of the voters. *Home Town Foods, Inc. v. National Labor Relations Board*, 379 F. 2d 241 (5th Cir. 1967), citing *National Labor Relations Board v. Tampa Crown Distributors*, 272 F. 2d 470 (5th Cir. 1959). The coercive acts need not be shown to have been perpetrated by the union itself. Coercion by rank and file members is enough to destroy the "laboratory conditions" which the Board must provide for the election. *Diamond State Poultry Co.*, 107 N. L. R. B. 3, 6 (1953); *Tyler v. N. L. R. B.*, *supra*, at 1275. "The important fact is that such conditions [coercion] existed and that a free election is hereby rendered impossible." *Diamond State Poultry*, *supra*, at 6; *Home Town Foods v. N. L. R. B.*, *supra*, at 244.

The court, in *Trade Winds Company v. National Labor Relations Board*, 413 F. 2d 1213 (5th Cir. 1969) stated that the prime consideration was not the effect of a single act, but the effect of the combined actions of the union men on the state of mind of the workers. In that case the court held that the Board erred in not granting the company a formal hearing on its objections to the representative election. *Trade Winds v. N. L. R. B.*, *supra*, at 1214.

The case before this Honorable Court is a textbook example of the Board's abuse of its discretion. Most of DVA's work force is female, and DVA became aware that the women employees were being harassed and would be in a state of fear if their addresses were released. It was also discovered that certain of the Union organizers had questionable backgrounds and records, further adding to the fear that an address release would cause among DVA's women workers. DVA requested a hearing in which to present this evidence, which it had uncovered since the representation hearing was held. The documents provided in support of the hearing request included sworn affidavits from

female employees of DVA. It was, and is, the intention of DVA to present testimony by the affiants and others to show that release of employee addresses to the union would destroy the necessary "laboratory conditions" for any election, and to show what the state of mind of the employees concerning the election would be if employee addresses were released.

The prior records of the Union organizers similarly constituted a part of the state-of-mind evidence. "It is true 'that when the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistance or continuance *at a later period*.' 2 Wigmore, Evidence, § 437 at 413 (3d ed. 1940)." *Amalgamated Clothing Workers of America, AFL-CIO v. National Labor Relations Board*, 345 F. 2d 264, 267 (2d Cir. 1965). [emphasis in the *original*]. Thus it was error for the Board to refuse to hear evidence on the factual question concerning state of fear of DVA's female employees if their addresses were released, since the acts referred to in the employees' affidavits, taken in the totality of their impact on the female employees of DVA, *Trade Winds v. N.L.R.B., supra; Home Town Foods v. N.L.R.B., supra*, could have (and in fact, had) a telling impact on the employees' states of mind.

Thus, it is submitted that the Board did, in fact, abuse its discretion by denying an evidentiary hearing on the unheard material and substantive, factual issues.

## IV. The Court of Appeals Erred in Not Remanding This Case to the National Labor Relations Board for an Adjudicatory Hearing on Whether in This Particular Case an *Excelsior* List Was Necessary.

It is respectfully suggested by Petitioners that remanding this case to the Board for a full evidentiary hearing is the appropriate relief. Such procedure will at

once remedy the wrong done here and clarify nationally the hearing requirements suggested in *Wyman-Gordon* but formalistically avoided by the National Labor Relations Board. In *Howell Refining Company v. National Labor Relations Board*, 400 F. 2d 213 (5th Cir. 1968), there was a representation hearing before the Regional Director. A disagreement on the bargaining unit arose, and the company asked the Board to review the Regional Director's determination. The Board denied the request for review on the ground that it raised no substantial issue for review. After the election the company objected to the election, alleging, *inter alia*, that union coercion prevented a free election. After an *ex parte* administrative investigation, the Regional Director issued a Supplemental Decision and Order overruling the company's objections. The company objected to the supplemental decision, claiming error in that no hearing was allowed on its objections. The Board refused again to hold a hearing, asserting that no issue significant for review had been raised. In answer to a refusal to bargain complaint, the company again raised its earlier objections. The Trial Examiner granted summary judgment against the company, which judgment the Board affirmed; and then the Board issued the Order that Howell Refinery Co. wanted set aside.

The court found that the Board erred in not granting a hearing:

> "However, we do not reach the question of whether there was interference in the free choice of the employees because we conclude that this question should not have been decided by the Board summarily and that the company should have been granted a hearing. Consequently, the Order of the Board is set aside and the case is remanded to the Board for a hearing on the company's claim that conduct attributed to the union generated such an atmosphere of fear, concern,

and confusion among the employees that a free expression of choice in the election was rendered impossible." *Howell v. NLRB, supra*, at 215.

In *Howell v. NLRB, supra*, there were affidavits from employees alleging personal experience with coercive incidents. Others swore that they knew of the coercion. While the Court acknowledged that there are no statutory provisions for the hearing asked for, granting such hearing is within the discretion of the Board, if it appears that the objections are based on allegations which have a basis in law and support in evidence, and that substantial and material factual issues are raised. *Howell v. NLRB, supra* at 217, 218. The enforcement of the Board's order was denied and the case was remanded for a full hearing. *Howell v. NLRB, supra*, at 219. Also remanded for a hearing on a coercion question were: *Trade Winds v. NLRB, supra; Tyler Pipe v. NLRB, supra; Bausch and Lomb v. NLRB, supra; NLRB v. Smith Industries, supra; NLRB v. Ortronix, supra; Home Town Foods v. NLRB, supra; NLRB v. Jodin, supra; NLRB v. Lord Baltimore Press, supra; NLRB v. Dallas Packing, supra.* All these cases were remanded to the Board for hearings on substantial material issues of fact, or newly discovered evidence. Thus, Petitioners respectfully suggest it not inappropriate to remand this case to the Board for a hearing.

**V. Additionally, the Supreme Court of the United States Is Respectfully Requested to Rehear and Reconsider the Issues Decided in NLRB v. Wyman-Gordon Co., supra, and Petitioner, Should This Honorable Court So Permit, Is Prepared to Brief Such Issues So That the Court May Reconsider Its Opinion.**

Your Petitioner respectfully requests that this Honorable Court rehear the issues decided in *NLRB v. Wyman-*

*Gordon Co., supra*, on the grounds that the issues therein and the resolution thereof has, and will have a vast impact on an area of national importance.

In the interest of a satisfactory clarification of the Board's use of the *Excelsior* "Rule" in violation of the National Labor Relations Act and the Administrative Procedure Act, Petitioner urges the Court to rehear and reconsider these issues in the instant case. Your Petitioner is prepared to brief and argue the issues should the Court permit.

## CONCLUSION.

WHEREFORE, for the reasons stated in this Petition, a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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